COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

THE REGULATION OF RATES, TERMS AND CONDITIONS FOR THE PROVISION OF POLE ATTACHMENT SPACE TO CABLE TELEVISION SYSTEMS BY TELEPHONE COMPANIES	)	CASE NO. 8040

and

In the Matter of

THE REGULATION OF RATES, TERMS AND CONDITIONS FOR THE PROVISION OF POLE ATTACHMENT SPACE TO CABLE TELEVISION SYSTEMS BY ELECTRIC UTILITIES	)	CASE NO. 8090

ORDER

On November 20, 1980, General Telephone Company of Kentucky ("General") and South Central Bell Telephone Company ("Bell") filed with the Commission a petition requesting that the Commission assert that it has jurisdiction to regulate the rates, terms, and conditions applicable to the provision of pole attachment space to cable television system operators by telephone utilities. Additionally, the petition requests that the Commission certify to the Federal Communications Commission ("FCC") that it does assert such jurisdiction and that the certification be in the form of the statutory language required by Section 224 of Title 47, United States Code.

On December 8, 1980, Kentucky Utilities Company and Louisville Gas and Electric Company ("LG&E") filed with the Commission a similar petition, requesting essentially the same relief. The petitions were consolidated for all purposes by the Commission, and a hearing was held on April 21, 1981. Kentucky Power Company intervened to join in the Petition of the other electric utilities, and American Television and Communications Corporation, Consolidated Cable Television Services, Inc., Kentucky CATV Association, National Cable Television Association, Inc., ("NCTA") and the Attorney General's Division of Consumer Intervention intervened in opposition to both Petitions.

Kentucky Power Company and LG&E have filed parallel motions to strike the brief of the National Cable Television Association, Inc., on the ground that it was mailed on May 19, 1981, rather than filed (i.e.,received by the Commission's Secretary) on or before May 18, 1981, as ordered by the Commission. LG&E further asserts that a copy of said brief was mailed directly to an official of LG&E, in violation of Kentucky Disciplinary Rule 7-104(A)(1), when an attorney of record is involved in the case.

The Commission reminds NCTA of the necessity of compliance with all orders of the Commission. However, because the late filing may have been inadvertent (one day late), and because the Commission must consider all ramifications of

this matter of considerable public importance, the motions are overruled.

BACKGROUND

There are more than 100 cable television systems in Kentucky whose cables linking subscribers are attached, for convenience, economy and aesthetic reasons, to existing utility poles in the areas served by the systems. The terms, conditions and rates for use of this space on utility poles have been the subject of private negotiation and written agreements between the affected utilities and the cable systems. Neither has heretofore asserted or invoked the jurisdiction of this Commission for permission or approval of the terms of these arrangements.

After extensive hearings, by Public Law 95-234, 92 Stat. 33, 47 U.S.C. § 224, Congress amended the Federal Communications Act so as to grant regulatory jurisdiction over cable television pole attachments to the Federal Communications Commission in those states which did not exercise such regulation, for a five year period beginning February 21, 1978.

Pole attachments on facilities of cooperative electric and telephone corporations, of which there are 40 regulated by this Commission, are specifically exempted from the federal regulation, and unless this Commission asserts jurisdiction,

would remain unregulated while other electric and telephone utilities would be regulated.

The federal act invites those states which have and will assert jurisdiction to regulate utility pole attachments to do so, and uses the language of "pre-emption" to indicate that when a state has affirmatively asserted to the FCC that such state regulation is active and on-going, the FCC will not assert jurisdiction. The legislative history of the federal enactment indicates that it is Congress' preference that regulation be done by the states.

The petitioning utilities have indicated their preference for state regulation, and the cable system operators, by opposing the petitions, have opted for federal regulation. The decision of this Commission turns upon the construction of our statutes.

DISCUSSION

The utilities argue that utility poles are an essential part of the facilities of the regulated utilities, that the amount paid for the use of space on the poles is a "...charge, rental or other compensation for service rendered..." [KRS 278.010(12)], and that this Commission can certify that it considers the interests of cable television ("CATV") consumers, as well as utility customers, in the ordinary course of deciding whether rates are "fair, just and reasonable" under the statutory mandate of KRS 278.190(3).

The intervening CATV operators contend that the pole attachment arrangement is not within the statutory scheme of regulating utility rates and services; that contemporaneous construction by the Commission, the cable operators, and the regulated utilities over the last 25 years has been that the PSC has no jurisdiction over the subject; and that the matter should remain open at least until the General Assembly meets next year. They point out that nowhere in the statute is there any mention of CATV or pole rentals. Moreover, they rely heavily on Benzinger et al. v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 38 (1943), which upheld the police power of a city to require utility wires to be buried by putting a restrictive interpretation on the statutory language empowering the Commission to regulate the "service" of a utility.

KRS 278.040 states that the Public Service Commission has jurisdiction over all the utilities in this state, and that the Commission shall have exclusive jurisdiction over the rates and service of those utilities. The petitioning utilities unquestionably are "utilities" within the meaning of KRS 278.010, and therefore, the question before us is whether the service of providing space on existing utility poles (and the rates charged therefor) are "rates" and "services" within the purview of this Commission under KRS 278.040.

The term "rate" is defined in Chapter 278, as follows:

> (12) "Rate" means any individual or joint fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement or privilege in any way relating to such fare, toll, charge, rental or other compensation, and any schedule or tariff or part of a schedule or tariff thereof. [KRS 278.010(12)].

The term "service" is even broader, being couched in non-exclusive language:

> (13) "Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure and quantity of water, and in general the quality, quantity and pressure of any commodity or product used or to be used for or in connection with the business of any utility...[KRS 278.010(13)] (Emphasis supplied).

The term "utility service" or "utility services" is not defined in the statutes at all.

Whether or not it was contemplated at the time of the original enactment of this statute, the petitioning utilities are clearly providing a "service" when they allow CATV operators, for a fee, to attach their cables to unused space on existing utility poles. The availability of this unused space on the poles (and the arrangements that have been made between the utilities and the cable operators) has greatly contributed to the development of the cable television industry in recent years.

The Commission concludes that the term "service" as used in KRS 278.040 has two levels. First, there is the primary meaning: that service to the public of the type for which the utility business was formed, thereby subjecting it to the jurisdiction of the PSC. Second, there is a service which arises out of the presence of or the use of the utility facilities. While this is not contemplated in considering whether the business of the utility is regulable, it still is a source of revenue to the utility which ultimately results in lower basic "rates" to the ultimate consumers of utility services. For this reason, Benzinger must be read as deciding only what was before the Court: that the PSC was not granted jurisdiction over those parts of the utility's operations which come within the "police powers" of a municipality. The Court's attempted definition and distinction between "essential utility functions" and "other functions" is awkward and difficult to apply. Since such distinction was not necessary to the court's decision, it should be considered dictum only. Neither petitioners nor intervenors contend that the regulation of rates, terms and conditions of pole attachments comes within the police powers of municipalities.

Therefore, the PSC may regulate these services without determining whether the activity is a "utility" function. The jurisdiction of the PSC over the affected

utility companies has been established. That jurisdiction also extends to their poles, which are an integral part of their facilities. In the instant case, the Commission is called upon to approve the "rate" the utilities are charging for the use of a previously unused part of these facilities. While this may not be one of the "services" contemplated when the statutory definition was created in 1934, nor even a "public utility" activity generally, it is clearly a "service" within the broad definition set forth in KRS 278.010. Because of their monopoly status, such services should be regulated in the public interest.

Intervenors argued at the hearing that revenues from pole attachment charges are like "money from the wife's folks," i.e., that since the utility already has the pole in place and there is unused space on the pole, any charge therefor is "reasonable." However, this Commission is of the opinion that all utility facilities should be operated to produce the optimal results; that if a utility facility can produce revenue from other uses without interference with essential utility operations, it must do so, and for a fair, just and reasonable rate. In turn, the revenue from such "other uses" reduces, pro tanto, the revenue that must be earned from conventional utility services rendered by the utility, thereby lowering the utility consumers' overall rate.

Both the petitioning utilities and intervening cable operators should be proud of a record of 25 years of increasingly heavy usage of utility pole space without a serious safety question having been presented to this Commission for its adjudication. This speaks well for the negotiation and drafting of the agreements whereunder the attachments are permitted, as well as the operations of the personnel of both groups in the field. However, if there were serious questions as to the safety practices of any utility allowing the use of its poles by another entity, this Commission has little doubt that it would invoke its jurisdiction to correct it.

KRS 278.260 expressly empowers the Commission to investigate "any rate," pursuant to complaint or upon its own motion, which may be "unreasonable or unjustly discriminatory," or "any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith" which may be "unreasonable, unsafe, insufficient or unjustly discriminatory...." (Emphasis supplied). Thus, viewed as whole, it is clear that the statutory scheme set forth in KRS Chapter 278, except as limited by the police power of municipalities, confers plenary jurisdiction over all "utilities" and their "facilities."

As to certification to the FCC required by the federal statute that this agency "...does consider the interest of the subscribers of the cable television services as well as the interests of the consumers of the utility services," this Commission adopts the view expressed in a recent opinion of the Appellate Court of Illinois:

> Since we have concluded that the Commission has the power to regulate leasing activities it follows that it is under the mandate to assure that the charges are "just and reasonable". Fulfilling that mandate necessarily entails balancing the interests of Cable TV subscribers with the other interests at stake; such balancing is all that the federal statute can reasonably be read to require. (Emphasis supplied). Cable Television Company of Illinois v. Illinois Commerce Commission, 82 Ill. App.3d 814, 403 N.E.2d 287, 290 (1980).

Thus, in exercising our jurisdiction over pole attachment rates, this Commission will consider the interests of the subscribers of cable television services as well as the interests of the consumers of utility services.

The electric utilities petition the Commission to allow them to file pole attachment agreements as "Special Contracts," under 807 KAR 50:025(11), while the telephone utilities have proposed that they file tariffs for this service. For the present, it seems preferable that the rates to be charged for CATV pole attachments, and the terms and conditions upon which the use is accomplished, be as

uniform as possible throughout each utility's service area. Hence it is preferable that all regulated utilities providing such pole space file tariffs for this service. In the event there are, or may later be, special circumstances calling for different rates, terms or conditions in a particular situation, then such arrangements may be handled under the "Special Contracts" provision of the regulations.

The Commission, having considered this matter, including the testimony at the public hearing and all briefs and correspondence of record, and being advised, is of the opinion and finds that:

1. Providing space on utility poles by utilities regulated by this Commission for cable television pole attachments is a "service" within the meaning of the definition of KRS 278.010(13);

2. The rates, terms and conditions for providing such pole attachment space are within the jurisdiction of the Commission under KRS 278.010(12) and KRS 278.040; and

3. Under KRS 278.030 and KRS 278.040, this Commission has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services, in the exercise of its jurisdiction over utility rates and utility services.

IT IS THEREFORE ORDERED that all utilities regulated by this Commission which provide pole attachment space for cable television systems shall file tariffs within 45 days of the date of this Order, setting forth the rates, terms and conditions therefor in the manner prescribed by the Regulations of this Commission.

IT IS FURTHER ORDERED that the Secretary shall certify to the Federal Communications Commission that this Commission regulates pole attachment rates, terms and conditions, and that this Commission has the authority to consider, and does consider, the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services, as provided in 47 U.S.C. § 224(c)(2).

Done at Frankfort, Kentucky this 26th day of August, 1981.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

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